

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

UNITED STATES OF AMERICA

v.

AGHEE WILLIAM SMITH, II,

Defendant.

CRIMINAL ACTION NO.  
2:19cr47

TRANSCRIPT OF PROCEEDINGS  
(**Sentencing Hearing**)

Norfolk, Virginia

August 24, 2022

BEFORE: THE HONORABLE RAYMOND A. JACKSON  
United States District Judge

APPEARANCES:

UNITED STATES ATTORNEY'S OFFICE

By: Andrew C. Bosse  
Melissa E. O'Boyle  
Elizabeth M. Yusi  
Assistant United States Attorneys  
Counsel for the United States

FEDERAL PUBLIC DEFENDER'S OFFICE

By: Andrew W. Grindrod  
Lindsay Jo McCaslin  
Assistant Federal Public Defenders  
Counsel for the Defendant

1 (Proceedings commenced at 11:02 a.m.)

2 THE CLERK: United States of America vs. Aghee  
3 William Smith, II, in Criminal Action 2:19cr47.

4 Ms. Yusi, is the government ready to proceed?

5 MS. YUSI: We are. Good morning, Your Honor.

6 THE COURT: Good morning.

7 THE CLERK: Ms. McCaslin, is the defendant ready to  
8 proceed?

9 MS. McCASLIN: We are. Good morning, Your Honor.

10 THE COURT: Good morning.

11 If you would please stand, Mr. Smith. Mr. Smith,  
12 have you conferred with your counsel to prepare for the  
13 hearing this morning?

14 THE DEFENDANT: I have, Your Honor.

15 THE COURT: Have you been satisfied with the advice  
16 and counsel you're receiving?

17 THE DEFENDANT: I have so far.

18 THE COURT: Fine. You may have a seat.

19 Counsel, the Court has received the Presentence  
20 Report and reviewed it with all the exhibits and attachments  
21 and the position papers and other documents filed in the  
22 case, and the Court finds that there are a series of  
23 objections outstanding in this case, and the Court wants to  
24 know if the United States still has no objections outstanding  
25 in this case?

1 MS. YUSI: No objection, Your Honor.

2 THE COURT: All right. And, Ms. McCaslin, I  
3 understand the defendant made some objections. I think there  
4 were four. Are all four of those objections still  
5 outstanding?

6 MR. GRINDROD: Yes, Your Honor.

7 THE COURT: Mr. Grindrod.

8 MR. GRINDROD: Sorry. If it pleases the Court, I'll  
9 be handling the objections, and Ms. McCaslin will be doing  
10 the general sentencing argument today.

11 THE COURT: All right, then. Okay. We will turn,  
12 then, to the first objection that the Court wishes to  
13 address, and it appears here that Mr. Smith objected to --  
14 it's a general objection to the PSR factual contentions  
15 proven at trial, and you object to numerous paragraphs in the  
16 Presentence Report; paragraphs 12, 21 through 26, 30, 33  
17 through 36, 42, 95 through 96.

18 And as you well know, Mr. Grindrod, before the Court  
19 is going to even address this, you have the burden of making  
20 some affirmative showing that the information in the  
21 Presentence Report is unreliable and articulate some reasons  
22 why the facts contained in the report are untrue or  
23 inaccurate, of course recognizing that we tried this case  
24 where witnesses were put under oath to testify beyond a  
25 reasonable doubt truthfully; to testify truthfully.

1           So with that, what is the reason that you contend  
2           that the report should not be accepted? What are you  
3           challenging as being untrue?

4           MR. GRINDROD: Your Honor, would you like me to step  
5           to the podium?

6           THE COURT: Sure.

7           MR. GRINDROD: Your Honor, obviously Mr. Smith  
8           pleaded not guilty and went to trial, and as we argued at  
9           trial, the government had not proven that Mr. Smith  
10          intentionally engaged in fraud or that he had awareness of  
11          the extensive fraud that was being conducted by people above  
12          him in these various organizations.

13          And so I understand the Court's position, and we  
14          understand the jury's verdict, but just to be clear for the  
15          record and for any further proceedings, Mr. Smith is  
16          objecting to those portions of the PSR that attribute him  
17          with fraudulent intent and attribute him with the conduct  
18          that resulted in his conviction in this case, Your Honor.

19          THE COURT: Okay. Thank you very much.

20          Having understood what you have articulated here,  
21          the Court believes the defendant has failed to meet his  
22          burden to establish that the report is unreliable or there  
23          are factual inaccuracies, and the mere fact that the  
24          defendant disagreed with the verdict is insufficient.

25          So without more, this first general objection to the

1 PSR factual contentions which have been proven at trial is  
2 overruled.

3 We next turn to the 20-level enhancement for loss  
4 amount between \$9.5 million and \$25 million. And, once  
5 again, the defendant objects to the accuracy of the entire  
6 loss amount. It's calculated in paragraphs 27 through 29 and  
7 37 through 40. And what this means, with this objection, is  
8 that we would have to go back and retry the case on the  
9 losses, but that is not where we're going.

10 First, as the Court has already articulated, the  
11 burden is on the defendant, once again. What is inaccurate  
12 about the losses? Articulate what is inaccurate or untrue  
13 about these losses here.

14 MR. GRINDROD: Your Honor, our position on this is  
15 different than our position on the first objection that the  
16 Court inquired about, and we tried to set out in as much  
17 detail as we could, in ECF 470, the PSR objections. I'm  
18 happy to go through it in detail, but I think we make at  
19 least five, maybe six distinct arguments there about various  
20 losses attributed in various paragraphs.

21 And so there are, I think -- I'm happy to go through  
22 each one of those distinct arguments. I think that, framing  
23 those more broadly, there are essentially two problems with  
24 the government's loss proof:

25 One is there are a number of losses described in the

1 PSR that are not attributed to any specific victim, any  
2 specific date, and so those -- we think that the proof that's  
3 required to substantiate a loss here is not met when the PSR  
4 doesn't articulate who suffered the loss, when the loss was  
5 suffered, and how Mr. Smith may or may not have been involved  
6 in causing that loss. So that's one kind of category  
7 objection.

8 And the other is, accepting that a loss was felt to  
9 a victim, there are certain categories of losses to which the  
10 government has not sufficiently tied Mr. Smith.

11 And so the government can prove losses, for example,  
12 associated with Dental Support Group. We acknowledge that  
13 the government offered at trial testimony about people who  
14 made investments through Dental Support Group; they offered  
15 testimony about what the purpose of that entity was; and that  
16 it was created by Daryl Bank. The government's theory, I  
17 believe, is that it was created essentially as a way of  
18 buying out disgruntled DSPF franchise investors.

19 But the problem with those losses and attributing  
20 those losses to Mr. Smith is that there is no evidence that  
21 Mr. Smith was in any way involved in that separate  
22 enterprise, DSPF Group or Dental Support Group. And, in  
23 fact, the very business model that the government describes  
24 seems to suggest that Dental Support Group was a competitor  
25 in some ways, in fundamental ways, with DSPF.

1           If someone was buying a franchise from an existing  
2 franchisee, then instead of doing that, one might think that  
3 they could have bought a franchise that had not yet been  
4 established by DSPF, Kent Maerki's organization in Arizona.  
5 And so every time someone bought a franchise from a  
6 disgruntled investor through Dental Support Group, that was  
7 costing DSPF in Arizona a potential franchise sale.

8           And so Mr. Bank may have had significant incentives  
9 on why he created Dental Support Group. Mr. Maerki, it's  
10 unclear whether he thought it was -- whether he was aware of  
11 that or not. But what the government hasn't established in  
12 any way is how Mr. Smith was tied into those when he never  
13 made a sale, and there's no record of evidence that he had  
14 been.

15           So I'm happy to go through in that much detail for  
16 all of them, but those are the categories of losses, and we  
17 tried to describe them in our position paper.

18           THE COURT: Thank you, Mr. Grindrod.

19           The Court understands that when there's an  
20 enhancement, the Court has to have the government meet its  
21 burden by a preponderance of the evidence. The Court simply  
22 wanted you to clearly specify your objection.

23           So the United States has the burden to state what  
24 the losses are by a preponderance of the evidence to overcome  
25 this objection, so the Court is prepared to hear from the

1 United States.

2 MS. O'BOYLE: Thank you, Your Honor.

3 Your Honor, the government would rely on the  
4 evidence at trial that was presented by, well, in particular,  
5 Al Martell, who testified for the better part of a day and  
6 who submitted a number of exhibits -- and I will go through  
7 them -- related to the losses in this case, specifically the  
8 investments that were set out in the Presentence Report.

9 The government has one document that it would like  
10 to proffer up, Government Exhibit 1, which is a synthesis,  
11 basically, of all -- it puts all the losses in one area, and  
12 it lists all the victims related to the investment. It  
13 basically is the binders kind of broken out into one document  
14 that is created. We would ask that it be filed under seal,  
15 and it's Government's Exhibit 1 at the sentencing.

16 THE COURT: Okay.

17 MS. O'BOYLE: And I'll be referring to that, Your  
18 Honor, as I go through this. And it's the -- it would be  
19 this, and it has little red tabs for ease to kind of go  
20 through.

21 So in connection with this particular -- with  
22 Government's Exhibit 1, the very first set of losses are  
23 losses related to Spectrum 100, and these come from  
24 Exhibit 517, which was Al Martell's binder related  
25 specifically to Spectrum 100. It lists every single



1 individual, the investment that they invested in, the amount  
2 of the loss, and their address, which is why we would ask  
3 that it be placed under seal.

4 And, Your Honor, if you go to the first red tab,  
5 there is ultimately a total for losses related to  
6 Spectrum 100, and that was \$7,746,510.56.

7 The next investment that we focused on was Western  
8 Spectrum. We specifically called Jeff Browne, who was an  
9 investor in connection with that particular investment. If  
10 you'll recall, there were two separate Western Spectrum  
11 investments. This is where the defendant actually created  
12 his own spectrum investment and sold it to specific victims.

13 The total loss amount related to these investors was  
14 1.3 million, approximately, and that comes directly from  
15 Exhibit 102C, which is -- the way that we figured this one,  
16 this probably understates the amount of money that they  
17 invested, because that's the amount that Janus Spectrum LLC,  
18 Mr. Alcorn and Mr. Maerki's entity, received and does not  
19 include any moneys that could have potentially been stripped  
20 before it got there.

21 If we go to the next -- so then the next listing of  
22 investors related to investors in Xcel Bandwidth, but they  
23 did it through the entity called Diversified Financing, and  
24 if you go to the third tab, the loss attributed to that  
25 particular investment, which Mr. Smith sold a substantial

1 amount of, is approximately 2.4 million. And the basis for  
2 this is Exhibits 624 and 629.

3 624, Your Honor, is the summary chart that Al  
4 Martell created, where he traced all the funds and analyzed  
5 the bank account; and 629 was Ms. Gibson's sales tracker for  
6 this particular investment, which reflected, in particular,  
7 that Mr. Smith continued to sell and sold a substantial  
8 amount of this investment late in 2016 and 2017.

9 The next tab is Xcel Bandwidth. This was -- if you  
10 recall, Raeann Gibson said that they sold Xcel Bandwidth in  
11 two different mechanisms: One was secured promissory notes,  
12 and the other was through another entity, another limited  
13 liability company. And so this was the second variation of  
14 how they invested in Xcel Bandwidth.

15 And the total here was another 2.7 million. The  
16 basis for this is, again, Exhibit 625, which was  
17 Mr. Martell's summary chart of this particular bank account,  
18 as well as 629 again, which was Ms. Gibson's tracker that  
19 tracked all of the investors in this particular investment,  
20 this form of it; and, once again, as the government presented  
21 at trial, Mr. Smith continued to sell this investment all the  
22 way through August of 2017, until the whole scheme collapsed  
23 because Mr. Bank was finally arrested.

24 The next set is every individual who invested in the  
25 Dental Support Plus Franchise. These are the franchise

1 piece, Your Honor. These are the actual franchises where  
2 limited liability companies were created for the investors,  
3 that Mr. Smith was involved on the ground floor in connection  
4 with this particular investment.

5 The total for Dental Support Plus was \$7,322,631.  
6 And again, this was -- the basis is Exhibit 200F and the bank  
7 accounts that were in the 1001 series. And, also, we know  
8 that this was a total loss because Exhibit 274 was the  
9 August 8, 2014, letter that Mr. Maerki sent letting everybody  
10 know that he was going to put Dental Support Plus on the  
11 shelf.

12 The last tab, Your Honor, the very last investment  
13 that's listed through here is DSPF Group, again listing each  
14 individual and the amount that they invested, and the total  
15 here for DSPF Group is \$892,500. And the basis for that part  
16 of the chart is Exhibit 250, which is, once again, Al  
17 Martell's summary chart binder that traced all of the funds  
18 related to DSPF Group.

19 That, Your Honor, brings the total losses to  
20 \$22,428,888.48. And it's the government's position that the  
21 20-level enhancement for losses exceeding 9.5 million, that  
22 the government is squarely within that. In fact, we're  
23 actually closer to the next band which goes -- we're about  
24 3 million away from the 25 million.

25 This is a conservative -- from the government's

1 perspective, this is actually a very conservative loss. We  
2 did not include WeMonitor, which was not part of this trial.  
3 We did not feel the need at this stage to add on another  
4 investment and prove it up here at the sentencing.

5 We did not include that. The defendant sold  
6 WeMonitor, but we didn't include those -- we actually had a  
7 discussion about that prior to coming in here, when the  
8 Presentence Report was prepared, and we agreed to remove  
9 losses related to WeMonitor from the calculation.

10 It also doesn't include Janus Spectrum Group. It  
11 doesn't include Prime Spectrum. Those are two other spectrum  
12 investments that Mr. Bank presented, which the defendant,  
13 because he was involved in all of those conference calls and  
14 he was involved in this conspiracy and knew full well what  
15 Mr. Bank and Mr. Maerki and Mr. Alcorn were selling -- those  
16 arguably could be reasonably foreseeable to him as well, but  
17 the government, because he didn't sell Janus Spectrum Group  
18 and he did not sell -- he didn't sell Prime Spectrum, we left  
19 those to the side.

20 But the government -- here, the defendant was  
21 convicted of Count One, which was the conspiracy to commit  
22 mail and wire fraud related to Dental Support Plus Franchise  
23 and DSPF Group. That was listed and we presented evidence,  
24 and we believe that all of the losses related to those  
25 entities were reasonably foreseeable.

1           This defendant, in particular, related to Dental  
2 Support Plus. We had testimony; we presented a transcript  
3 that reflected -- specifically, it was Exhibit 286, where the  
4 defendant testified in front of the Arizona State Corporation  
5 Commission about Dental Support Plus and his involvement in  
6 it. And in that transcript, it reflects that he was involved  
7 in a failed investment called Dazzle Dental, which was then  
8 repackaged and sold as DSPF.

9           Bill Smith was on the ground floor of this  
10 investment. He was involved in Dental Support Plus Franchise  
11 before Daryl Bank was involved in Dental Support Plus  
12 Franchise. He was there at the genesis of this investment,  
13 and the government also demonstrated that this defendant was  
14 getting overrides on sales to other people's clients.

15           So what Mr. Smith is essentially arguing to the  
16 Court is that he doesn't want to be held accountable for  
17 sales to victims that he never met and he never spoke to, but  
18 he had no problem taking money from them when he was involved  
19 in this conspiracy.

20           If the Court recalls, AUSA Yusi showed a copy of a  
21 check from DSPF to Bill Smith from Virginia victim Terri  
22 Walsh, and Terri replied something to the effect of "He  
23 received more money from this investment than I did."

24           And the jury, by convicting him of Count One, they  
25 concluded that Bill Smith knowingly and intentionally entered

1 into this conspiracy to sell DSPF to victims across the  
2 country and certainly reaped the financial rewards from doing  
3 so, and so as a result, he should be held responsible for the  
4 over 7 million in losses related to those entities.

5 He also should be responsible for the losses related  
6 to DSPF Group, which were appropriately included in the loss  
7 calculation. He asserts that the group was a competitor to  
8 DSPF.

9 I'm at a loss as to how an entity that was created  
10 so that you could defraud new investors so that you could  
11 repay old investors who were complaining, and salesmen --  
12 Tony Sellers, his conspirator Tony Sellers, was paid from  
13 these funds -- how that is somehow in competition with the  
14 original DSPF.

15 As a conspirator with Daryl Bank, he was on the  
16 conference calls, Your Honor. Exhibit 235 is a conference  
17 call where Daryl Bank specifically talks about DSPF Group and  
18 the creation of DSPF Group, and it was discussed by  
19 Mr. Maerki at different times. And Mr. Smith, more  
20 importantly, continued to work with Daryl Bank and Kent  
21 Maerki even after Dental collapsed and all the investors lost  
22 their money in August of 2014.

23 So the \$892,500 in losses were certainly foreseeable  
24 to Smith, and he should be held accountable for them,  
25 particularly given that the jury found him guilty of

1 Count One for the DSPF conspiracy in total. They want to try  
2 to extract it and make it a totally separate thing, and it  
3 wasn't, Your Honor.

4 Focusing just specifically on the last two -- what I  
5 kind of view as the last two objections that Mr. Grindrod and  
6 Mr. Smith made related to Diversified Financing and then  
7 Spectrum 100 -- those were, as the government read it, those  
8 were the last two issues that he had.

9 Diversified Financing, I was a little perplexed  
10 because as the Court can see -- and you can see in the  
11 exhibits of Government 629, 624, and 625 -- the only losses  
12 related to Diversified Financing that the government is  
13 relying on here are those related to Xcel Bandwidth.

14 And it was very clear from Ms. Gibson's testimony,  
15 from Mr. Martell's testimony, and from the victims who  
16 invested in Xcel, that Mr. Smith was very involved in selling  
17 this. He sold more of it than any other salesman at this  
18 point in the conspiracy, because most folks had actually --  
19 Mr. Sellers, Mr. Barnett, the two other conspirators in this  
20 case, had already withdrawn from the conspiracy at this  
21 point.

22 So I think there might be a little bit of confusion  
23 with the reference to Diversified Financing, but make no  
24 mistake, the evidence was that these relate to Xcel  
25 Bandwidth, and the only amounts that are included here in the

1 losses are related to the sale of Xcel Bandwidth by Daryl  
2 Bank, Bill Smith, and a couple of other salesmen who were  
3 relatively new to this venture and who had not been involved  
4 as long as Mr. Smith had.

5 So these losses, as well, were within the scope of  
6 this criminal activity, are squarely within the heart of  
7 Count Two -- which is conspiracy to commit mail and wire  
8 fraud related to the spectrum investments -- and were  
9 certainly reasonably foreseeable from Mr. Smith because he  
10 sold a ton of it.

11 So the last objection that I believe he had was  
12 related to the losses for Spectrum 100. And again, the  
13 government believes that it was very appropriate to include  
14 losses related to the full investment here because he was  
15 involved in a conspiracy. Count Two charged the conspiracy  
16 related to spectrum investments.

17 And Spectrum 100 was, by far, the largest investment  
18 that Daryl Bank created and solicited investors for. It was  
19 the largest loss. And Bill Smith sold a ton of Spectrum 100  
20 as well. It was talked about again in the conference calls  
21 amongst all the sales folks. When there were conferences in  
22 Vegas, it was discussed.

23 And again, this particular defendant was warned.  
24 Doug Dunn specifically testified that he warned Bill Smith  
25 about Daryl Bank and continuing to work with him, and yet the



1 defendant never stopped. And that was a theme that was at  
2 trial amongst the witnesses in this case and that the  
3 government argued to the jury. And even after Spectrum 100  
4 failed to provide any return on investment, he didn't  
5 disassociate, and he continued to sell fraudulent  
6 investments.

7 So the defendant here was involved knowingly and  
8 intentionally in a conspiracy to defraud investors related to  
9 spectrum.

10 We have -- we have conservatively calculated those  
11 losses based on an investment that this defendant sold, and  
12 he knew full well that Daryl Bank was selling this through a  
13 number of other people, including Tom Barnett, including  
14 others that were selling it, and as a result, they were  
15 reasonably foreseeable to him and were appropriately included  
16 in this loss calculation, Your Honor.

17 I think that would conclude the government's  
18 presentation related to losses, unless the Court has any  
19 questions.

20 THE COURT: The Court has no questions.

21 MS. O'BOYLE: Thank you.

22 THE COURT: Government's Exhibit 1 will be admitted.  
23 Any response, Mr. Grindrod?

24 THE CLERK: Under seal?

25 THE COURT: Under seal.

1 (Government Exhibit 1 was admitted under seal.)

2 MR. GRINDROD: Yes, Your Honor, I'll start with the  
3 reference to Western Spectrum losses.

4 And so our objection to the Western Spectrum losses,  
5 as set out in ECF 470, was that there was just a conclusory  
6 assertion without dates, investor names, or any other  
7 information about losses related to Western Spectrum. This  
8 is at the bottom of Page 3 of our objections.

9 THE COURT: Okay. Let's take that back to the  
10 Presentence Report. It's the bottom of your objections.  
11 Let's take it back to the Presentence Report, to the  
12 paragraph you're objecting to.

13 MR. GRINDROD: Paragraph 38, Your Honor.

14 THE COURT: Hold one second.

15 So those were losses of \$1,300,390.

16 MR. GRINDROD: Correct, Your Honor.

17 So our position before today's hearing was that's  
18 just a conclusory label. There's not evidence to support it.

19 The government's response this morning was to look  
20 at Government's Exhibit 1, which the pages aren't numbered,  
21 but when you flip to the section -- I think yours might be  
22 tabbed, Your Honor.

23 THE COURT: Pass Exhibit 1 back up.

24 THE CLERK: You still have it there.

25 THE COURT: Oh, I sure do. Let's see if we can find

1 what page you're on, Mr. Grindrod. Okay. I think the Court  
2 has it.

3 MR. GRINDROD: It's just after the Spectrum 100 and  
4 before the Diversified Financing FBO Xcel Bandwidth. And all  
5 we have here, unlike the government's other alleged losses in  
6 this exhibit, there's no name, there's no date, there's no  
7 investor amount. It just says Western Spectrum investments  
8 and then lists that same conclusory number.

9 Now, this Court obviously has to make specific  
10 findings about losses. Those losses can be estimated, but  
11 there has to be some factual basis for them, and here it's  
12 just the government's say-so. They didn't prove these losses  
13 at trial. They certainly haven't done anything more to add  
14 to that at sentencing, and so we would ask that those be  
15 stricken.

16 The only other reference, I believe -- and I was  
17 trying to pay attention, and Ms. O'Boyle can correct me if I  
18 was wrong, but I think the only other reference as far as  
19 factual support for that objection that was offered today was  
20 a reference to Government's Exhibit 1002C, which appears to  
21 be a Janus Spectrum account statement from their Wells Fargo  
22 Bank account.

23 It's unclear to me -- and I couldn't go through it  
24 in great detail sitting there at the table this morning, but  
25 it's unclear to me where the factual support is for that

1 objection.

2 So that's my response to that, Your Honor. I'm  
3 happy to answer any factual questions.

4 With respect to Diversified and distinguishing  
5 Diversified versus Xcel, I agree with Ms. O'Boyle that the  
6 clarification that was offered this morning was helpful in  
7 the sense that it wasn't clear in the PSR, and perhaps the  
8 defense just didn't put together what the government thought  
9 was obvious, but the government, I think, has clarified that  
10 the Diversified reference in the PSR was a reference to Xcel  
11 Bandwidth-type losses.

12 THE COURT: So you're withdrawing your objection to  
13 that?

14 MR. GRINDROD: Well, I withdraw that aspect of the  
15 objection, that we don't even know what this is. I guess my  
16 objection to that is still the same as it is for the excess  
17 losses associated with Spectrum 100 or Xcel or DSPF, which  
18 is, in our view, Mr. Smith shouldn't be held accountable for  
19 losses that are tied to transactions that there isn't any  
20 factual tie to.

21 And so we still have, essentially, the lack of a  
22 nexus between Mr. Smith and the loss that's suffered other  
23 than he sold this product and so every loss associated with  
24 that product is attributable to him.

25 And Ms. O'Boyle's response to that, at least with

1     respect to Dental Support Plus Franchise this morning, was,  
2     well, Terri Walsh didn't have any interactions with Mr. Smith  
3     and yet Mr. Smith got paid. I think that begs the question,  
4     right? Our whole point is, okay, well, then, that goes into  
5     the bucket of transactions in which he can be factually tied  
6     or to which he received some -- from which he received some  
7     sort of benefit.

8             The whole point is what about all of the other sales  
9     that there is no connection between Mr. Smith and that sale  
10    other than the fact that he was one of many salesmen working  
11    for these companies?

12            THE COURT: But that's not the law. That's not the  
13    law, that he has to be factually involved or be a  
14    beneficiary. That's not the law, when he's convicted of a  
15    conspiracy, that he's aware and he's a participant in the  
16    conspiracy. He's responsible for conduct of conspirators,  
17    co-conspirators.

18            MR. GRINDROD: Conspiratorial liability along the  
19    lines that Your Honor just discussed is broader than relevant  
20    conduct and the government's duty to -- burden of proving  
21    jointly undertaken criminal activity.

22            And so I think what Your Honor said is not wrong,  
23    but it's not -- it doesn't answer this question, which is  
24    when you have to make specific factual findings as to what is  
25    the scope of the jointly undertaken criminal activity, what

1 transactions fell within the scope of that jointly undertaken  
2 activity?

3 Those are the questions that are going to lead to  
4 the loss-amount answer, and those are the -- I think what I'm  
5 describing is certainly one way the government can prove it.  
6 If the government wants to point to other cases in which a  
7 broader theory is available, then so be it, but I think that  
8 our argument is that the conspiracy question is something  
9 that may be relevant for some purposes but doesn't answer the  
10 relevant conduct inquiry under the cases that we cite in our  
11 position paper.

12 THE COURT: There are three things that the Court  
13 has to answer, and the Court knows what those three questions  
14 are. And you go on and continue with your argument.

15 MR. GRINDROD: Your Honor, I think that our  
16 objection with respect to the Spectrum 100 losses, the  
17 Diversified as clarified by Ms. O'Boyle, the other Xcel  
18 losses, and the DSPF losses are all that same category of  
19 objection, and so I think, whether the Court agrees with our  
20 view of the law on that or not, I think those probably all  
21 cash out the same way depending on how Your Honor rules.

22 So I'll just turn briefly to Dental Support Group.  
23 I mentioned this in my kind of opening remark. Just to  
24 respond to Ms. O'Boyle, I think it is pretty clear how they  
25 are, in function, acting as competitors.

1           When you have a finite amount of money, if some  
2 person or group of people has \$25,000 to buy an investment  
3 and they're going to buy a Dental Support franchise, if they  
4 buy it directly from Kent Maerki, Kent Maerki puts 25,000 in  
5 his pocket. If they buy it from somebody who bought that  
6 same franchise eight months earlier, Kent Maerki does not  
7 have \$25,000 in his pocket; that person does.

8           And so, again, the leaders of the scheme who were  
9 concerned about people, you know, figuring out what Kent  
10 Maerki and Daryl Bank were doing, I can understand why they  
11 would want to buy off disgruntled investors, but if the scope  
12 of Mr. Smith's jointly undertaken criminal activity is the  
13 success of DSPF, then why would someone want to take a sale  
14 of a franchise away from DSPF and instead have that sale  
15 coming from a private seller?

16           I think that's how they're competitors. I don't  
17 know if the Court has questions about that, but that's our  
18 theory on that.

19           THE COURT: Okay. Thank you.

20           Ms. O'Boyle, can you respond to that last question  
21 that he just raised, about the relationship between Dental  
22 Support Plus and Dental Support Group?

23           MS. O'BOYLE: Yes, Your Honor.

24           THE COURT: I think the Court heard you initially  
25 when you talked about the way Dental Support came about, but

1 let's further amplify on that, please.

2 MS. O'BOYLE: Just so we can be very clear, they are  
3 not competitors because at the end of the day, the money was  
4 ending up at Dental Support Plus Franchise. Daryl Bank was  
5 taking 30 percent off the top, and he was sending the money  
6 back to Kent Maerki and the entity, and it was continuing to  
7 sustain this criminal enterprise that Mr. Smith was a part  
8 of, was one of the very -- one of the people who was there at  
9 the genesis of the event.

10 So the fact that Daryl and Kent created an entity so  
11 that they could continue to rip off customers is certainly an  
12 entity that is supporting the criminal enterprise that  
13 Mr. Smith knowingly and intentionally engaged in.

14 So the exhibit that I would point you to, Your  
15 Honor, that provides that -- that summarizes that is 250A,  
16 which is the summary chart of the DSPF Group account. And  
17 that particular summary chart shows exactly what the  
18 government said, which is they would get money from investors  
19 and it would go into the DSPF Group account.

20 Daryl Bank and Raeann Gibson would take 30 percent  
21 straight off the top into their entities and then send 70  
22 percent of the money to either pay off disgruntled investors  
23 or send money back to Kent Maerki, who then would pay off  
24 disgruntled investors.

25 So at the end of the day, it wasn't in competition



1 with Dental Support Plus. It was an entity that was created  
2 to continue the fraud, because at the end of the day, the  
3 franchises were not performing, and at this point, everybody  
4 knew it. And the only way that you could continue to keep  
5 this enterprise afloat was to create a new entity, not tell  
6 people that it was failing, and rip off new investors so that  
7 you could repay old investors, and in one instance,  
8 Mr. Sellers, a conspirator, got \$40,000 himself in connection  
9 with this investment.

10 So it's not in competition with Dental Support Plus.  
11 It was a way to continue the fraud. And this particular  
12 defendant -- the government proved it at trial; the jury  
13 convicted him of Count One that alleged this whole criminal  
14 enterprise related to DSPF and DSPF Group that started in  
15 January of 2011 and went all the way through August of 2014.

16 And this defendant was involved in all of it, and he  
17 never disassociates himself from Mr. Bank even knowing that  
18 all this is going on. He continues to sell Mr. Bank's  
19 investments all the way through August of 2017.

20 So that's the government's response to that  
21 question, unless the Court has any other questions.

22 THE COURT: No. I think the Court has heard enough  
23 from both parties here about the tendered loss in this case.  
24 And the Court understands the defendant's objection to the  
25 loss amount here.

1           The defendant objects to the accuracy of the entire  
2 loss that's been calculated in this case, essentially because  
3 the defendant contends that he wasn't involved in the  
4 planning, the organizing, or the supervising of the broader  
5 conduct in this conspiracy, and so the defendant really wants  
6 to limit his loss to those things that he says he was  
7 personally involved in or maybe with people that he was  
8 closely connected with.

9           But the Court has a different approach to this, and  
10 that is, the Court understands that this defendant is charged  
11 with conspiracy. It's a broad conspiracy that's been charged  
12 in this indictment. And what the evidence has shown is --  
13 and the Court sat through this trial, and the Court's handled  
14 a number of other sentencings involving this same trial --  
15 that we're dealing with a jointly undertaken criminal  
16 activity here; jointly undertaken criminal activity.

17           And when that happens, the law is a defendant is  
18 accountable for the conduct -- acts and omissions -- of other  
19 folks that were within the scope of the jointly undertaken  
20 criminal activity, in furtherance of that criminal activity,  
21 and for things reasonably foreseeable in connection with the  
22 criminal activity.

23           So as we approach the determination of what the law  
24 should be, the Court has to focus really on the scope of the  
25 jointly undertaken criminal activity, acts that were taken in

1 furtherance of that criminal activity, and what was  
2 foreseeable from the conduct that took place in that criminal  
3 activity. And as the Court understands here, the Court is  
4 clearly recalling the defendant's involvement in this case.

5 The government has approached its burden to prove by  
6 a preponderance of the evidence what the loss is by referring  
7 back to the record and exhibits, and they have introduced  
8 Government's Exhibit 1 to identify the amounts of the loss  
9 involved in this particular case.

10 Now, in terms of whether the defendant was involved  
11 in the conspiracy, the jury has found that he was criminally  
12 involved in this conspiracy; the evidence at trial showed  
13 that he was criminally involved. He was involved with  
14 Mr. Maerki and Mr. Bank when they conducted phone calls in  
15 support of the criminal activity. So he was aware of what  
16 was going on when they were talking about the offerings and  
17 how to make pitches to the clients; he was involved.

18 He was involved in a number of these sales and  
19 offerings from the beginning and stayed in it through 2017.  
20 So he cannot say he was not aware of what was going on. It  
21 does not matter that he didn't know every other sale that was  
22 made by an individual, but he does know that he was involved  
23 in criminal activity to sell fraudulent franchises,  
24 fraudulent investments. He knew that much, and he profited  
25 from it.

1           So he was in a position where, the evidence shows,  
2           that he could reasonably foresee harm to other people.  
3           Though he did not know every sale that was being made by  
4           other salespersons, he knew the sales were taking place, and  
5           he knew the sales were fraudulent, and that's what it boils  
6           down to, in a nutshell.

7           So he has some accountability for the acts of other  
8           people who did things within the scope of this criminal  
9           episode, and the criminal episode here was the provision of  
10          fraudulent franchises and other investments to people from  
11          which they profited.

12          Now, if we go back and look at the Government's  
13          Exhibit 1, the United States has pointed out some of the  
14          exhibits in trial that support what is set forth in the  
15          exhibits. They refer to Exhibit 102 on Xcel Bandwidth,  
16          Exhibit 624 and 629, the testimony of Raeann Gibson that  
17          supported the figures there.

18          They also referred to other exhibits, Exhibit 200F  
19          and 250, for support of the figures set forth on Dental  
20          Support franchise. Mr. Smith was involved in the Dental  
21          Support franchise offerings from the beginning. That loss is  
22          calculated at \$7,322,631. Okay? That was Exhibit 250.

23          They also pointed out that the Dental Support  
24          franchise group was also involved in these -- in this  
25          fraudulent investment scheme, and the moneys coming from that

1 were used to repay old investors. This was Exhibit -- I  
2 think 235 was involved.

3 Then there's Diversified Financing that both parties  
4 have referred to here that was also involved in this scheme,  
5 as well as Spectrum 100, from which funds were lost.

6 The Court adopts the loss amount set forth in the  
7 exhibit, except the Court will strike and will not consider  
8 the spectrum investors in paragraph 38 of the Presentence  
9 Report because the Court doesn't believe that the government  
10 has laid out sufficient detail to support that amount.

11 So what the Court is going to do is the Court is  
12 going to subtract that amount of loss from the loss that they  
13 have stated the defendant should be responsible for. The  
14 ultimate loss was \$22,428,888.48, and we're going to have to  
15 subtract that \$1,300,390 from that amount to come up with the  
16 final amount of loss.

17 Otherwise, I think that the government has shown by  
18 a preponderance of the evidence, referring back to the trial  
19 evidence and Exhibit 1, that the defendant is responsible for  
20 a loss far in excess of 9.5 million and well within the scope  
21 of the sentencing guideline which would support the 20-point  
22 enhancement. It's far more than 9.5 million.

23 Even if the Court strikes a substantial portion of  
24 what the government has said here -- even the Spectrum 100  
25 has a loss of \$7,746,000, then we look over at the Dental

1 Support franchise, and that has a significant amount. So  
2 we're far beyond \$9,500,000.

3 So the bottom line is, the Court believes that  
4 there's sufficient evidence here, based on what was submitted  
5 at trial and the summary the Court has right here now, to  
6 support the 20-point enhancement. The only thing the Court  
7 has to do is redo the math, unless somebody else has already  
8 done the math.

9 MS. O'BOYLE: Your Honor, I think I've done the  
10 math, if someone could check me. I believe the loss now  
11 is -- and we'll have to alter the restitution order as well,  
12 but that will be easy to do -- \$21,128,498.48.

13 THE COURT: Okay. Now, Mr. Grindrod, I'll give you  
14 a chance to recheck that, and the Court will also, with its  
15 slow calculator.

16 (Pause)

17 MR. GRINDROD: We agree with that calculation.

18 THE COURT: Okay. All right. So we now shift the  
19 loss here to \$21,128,498.48. Okay. That's the Court's  
20 finding with respect to the loss amount. The Court grants  
21 the objection and denies the objection in part by changing  
22 the amount of the loss.

23 We now go to the third objection that the defendant  
24 raises here in the case. And that has to do with the  
25 four-level enhancement for an offense involving securities

1 law. And the government has the burden here. I think when  
2 it all boils down, we've got to determine whether this  
3 enhancement should apply and whether the defendant is engaged  
4 in conduct involving securities law when we break it all  
5 down.

6 And the government has the burden to show that;  
7 otherwise, the Court is going to strike the four-level  
8 enhancement. So the Court is prepared to hear from the  
9 United States.

10 Does the defendant's violation involve securities  
11 law sufficient to warrant an enhancement under 2B1.1(b)(20)?

12 MS. YUSI: Thank you, Your Honor. The government  
13 does believe -- as we stated in our position on sentencing,  
14 we do believe the four-level enhancement is appropriate.

15 And defendant is right that he wasn't charged with a  
16 violation of securities law, but he doesn't have to be  
17 charged with a violation of securities law in order to get  
18 this enhancement.

19 He held himself out as an investment adviser,  
20 whether he used those words specifically or not. But the  
21 definition of "investment adviser" is "any person who, for  
22 compensation, engages in the business of advising others,  
23 either directly or through publications or writings, as to  
24 the value of securities or to the advisability of investing  
25 in, purchasing, or selling securities, or who, for

1 compensation and as part of a regular business, issues or  
2 promulgates analyses or reports concerning securities,"  
3 which, as the Court saw throughout the entire trial, he  
4 clearly was engaged with, and we had several different  
5 witnesses specifically say that they believed he was their  
6 investment adviser, being Ms. Sharyon Bean, Ken Sykes, Carol  
7 Groff.

8           And in terms of whether or not these were  
9 securities, Your Honor, we didn't, again, have to prove that  
10 at trial; however, under the Howey Test, which I know this  
11 Court is familiar with, a security is considered a security  
12 if it's an investment of money, there's an expectation of  
13 profits from the investment, the investment of money is in a  
14 common enterprise or pooled together, and any profit from the  
15 efforts of -- any profit comes from the efforts of a promoter  
16 or a third party.

17           And, Your Honor, particularly in the spectrum  
18 investments, Your Honor, those were all investments of  
19 moneys; all of the people that invested in it expected  
20 profits based on Mr. Smith's promises and fraudulent  
21 representations; it was all pooled together, as we saw  
22 throughout the summaries that Ms. O'Boyle mentioned; and any  
23 profit comes from the efforts of a promoter or third party.  
24 The promoter here was Mr. Smith, and so these were clearly  
25 securities. Whether or not we had to call them securities,



1 it was a whole nother level that we didn't need to do at  
2 trial, but we do so now.

3 Your Honor, in terms of specific evidence, other  
4 than the testimony we mentioned that was presented at trial,  
5 where Mr. Smith does present himself as an investment adviser  
6 as that is defined, we look at:

7 Government's Exhibit 202, which is one of the  
8 advertisements for Dental Support Plus that Mr. Smith would  
9 give to his potential clients or his clients, and that was  
10 that tri-fold brochure, Your Honor, that we saw again and  
11 again during the trial, that included the feasibility  
12 modeling illustration, talking about the potential revenue  
13 and profits that each of these clients would make;

14 Exhibit 637, Your Honor, which was a PowerPoint that  
15 Mr. Smith provided to clients entitled "Collateralized Fixed  
16 Asset Planning" and talking to them specifically about  
17 investing in the collateral side of different investment  
18 opportunities;

19 And on the last page of Exhibit 637 where it talks  
20 about "About the Author," that A. W. Smith of A. W. Smith &  
21 Associates has been ranked among the top three financial  
22 consultants in the U.S.A. from 1986, and he talks about all  
23 of his background, where he's talking to people that he's  
24 going to help them invest for the future, for profit, and  
25 these are all in common enterprises, in particular for the

1 spectrum investments;

2 Exhibit 826 that was presented at trial through  
3 Mr. Sykes is an e-mail where he attaches, again, an  
4 investment, a structured income planning report that he  
5 prepared for the Sykeses that talks about the income plan for  
6 the Sykeses if they invest in those particular things;

7 We've seen the agreements, Your Honor, again and  
8 again -- just as an example, the one with Mr. Sykes was  
9 Exhibit 833 -- the agreements where they're putting in money  
10 into a joint venture or pooled money, and we saw again and  
11 again all the different types of agreements or promissory  
12 notes, or however they decided to call it. All it was was an  
13 investment into pooled money;

14 We also have Exhibit 860, Your Honor, which was one  
15 of the audio recordings from Mr. Smith's radio show where  
16 there was a clip of an advertisement for people to call him  
17 for all their financial planning needs;

18 Exhibit 1216, Your Honor, which was the video that  
19 we saw where A. W. Smith presents spectrum, which was the one  
20 that he used. I think Mr. Maerki had done one; Mr. Smith did  
21 a voiceover and presented the whole video, as well, trying to  
22 hock the spectrum investments;

23 And in terms of whether Mr. Smith had any awareness  
24 that these were in violation of securities laws, you can look  
25 at Government's Exhibit 3, which was the background,

1 Mr. Smith's background in FINRA, and all the different levels  
2 of testing that he had taken and had kept up to date at some  
3 point. He had let them lapse by the time he was selling most  
4 of these products, Your Honor, but he knew these were  
5 investments, and he knew that these people were -- that they  
6 were trusting him as investment advisers.

7 And, Your Honor, we believe, based on these, the  
8 defendant's objection should be overruled.

9 THE COURT: So you're saying to the Court because he  
10 held himself out as an investment adviser and he was selling  
11 securities, he was involved in violations of securities law?

12 MS. YUSI: Correct, Your Honor. These were  
13 unregistered securities, Your Honor, based on the Howey Test.  
14 Like I said, he didn't have to be charged with violations of  
15 securities law, but he held himself out as an investment  
16 adviser, and under the Howey Test on whether or not these  
17 were investment contracts or securities, they tick all the  
18 boxes, Your Honor.

19 THE COURT: Okay.

20 MS. YUSI: Thank you.

21 THE COURT: Mr. Grindrod?

22 MR. GRINDROD: So, Your Honor, there are two  
23 questions that the Court has to answer in the affirmative to  
24 sustain the government's position here and overrule our  
25 objection. They haven't met either.

1           The fundamental question, though -- this is a very  
2       easy question to answer now because the government had to  
3       show that Mr. Smith violated the securities laws. As defined  
4       by the guideline, the guideline says "Securities law means,"  
5       and then it lists a number of statutes, and it lists -- and  
6       it says, "includes the rules, regulations, and orders by the  
7       Securities and Exchange Commission" that are issued pursuant  
8       to those statutes.

9           THE COURT: What section of the guidelines are you  
10      talking about?

11          MR. GRINDROD: Your Honor, this is in 2B1.1, and  
12      it's comment note 16(A).

13          THE COURT: The Court simply wanted to go right back  
14      to where you were, Mr. Grindrod, and you said you were in  
15      2B1.1.

16          MR. GRINDROD: Yes. The definition of "securities  
17      law" appears in the comment 16(A). The guideline provision  
18      that the term appears in is 2B1.1(b)(20)(A)(iii).

19          THE COURT: The Court's got it. Okay.

20          MR. GRINDROD: I don't want to get too lost in the  
21      weeds here. My point is they have to show a violation of a  
22      statute or an SEC rule or regulation implementing that  
23      statute.

24          They did not cite in their position paper a single  
25      securities statute or securities regulation implementing

1 those statutes. Ms. Yusi talked this morning. She did not  
2 cite a single securities law. So how can they have possibly  
3 met their burden when they have not even identified the  
4 securities law that they claim Mr. Smith violated?

5 They're right; they don't have to charge him with it  
6 and prove it at trial, but they have to at least mention a  
7 statute when they're saying that the threshold question of a  
8 violation of securities law has been satisfied.

9 The second point, Your Honor, is what Ms. Yusi spent  
10 most of her time on this morning, which was whether Mr. Smith  
11 qualified as an investment adviser. Again, this is not an  
12 investment adviser and you just figure out what the ordinary  
13 meaning of that term is. This is a statutorily defined term,  
14 and the statutory definition is incorporated into the  
15 guideline provision.

16 We dealt extensively with the specific statutory  
17 definition and what is necessary to make that showing in our  
18 position paper. The government says, well, people thought of  
19 him as advising them, he held himself out as being an  
20 investment adviser. That's not how you answer a question of  
21 statutory interpretation whether someone actually meets a  
22 statutory definition.

23 The whole point of the investment adviser definition  
24 was to distinguish between people who are compensated  
25 basically for providing advice about whether or not it was a

1 good idea to invest in this security or that security versus  
2 people who are compensated on a transaction basis, like  
3 broker-dealers or other people who were compensated through  
4 commissions.

5 Now, I think the uncontradicted testimony at trial  
6 was that Mr. Smith was compensated by commissions. If  
7 someone came in and sat down in his office for an hour and a  
8 half and they talked but he didn't sell an investment  
9 product, he wasn't compensated for that.

10 If, on the other hand, somebody came in and said  
11 "this is what I want, I know right away, you don't have to  
12 talk to me about it at all" and he sold a DSPF unit, he got  
13 his commission for that unit.

14 And so the government can't just say, at a high  
15 level, everyday folks might call him an investment adviser.  
16 That's not the regime that the statute sets up or that the  
17 guidelines incorporate.

18 And I'd be happy to answer any questions the Court  
19 has about those positions, but I think the easiest way to  
20 revolve this is just at the threshold question of the fact  
21 that it was the government's burden, and in their entire  
22 written filing and in their entire oral presentation today,  
23 they haven't identified what securities law they say he  
24 violated.

25 THE COURT: Okay. We have a four-level enhancement

1 for an offense involving securities law. It's  
2 Section 2B1.1(b) (20) (A) (iii). And the defendant has objected  
3 to this particular enhancement. The enhancement applies in  
4 the case of a defendant convicted under a general fraud  
5 statute if the defendant's conduct violated securities law or  
6 a commodities law, even if the officer is convicted of wire  
7 fraud.

8 Now, there's no question the evidence has shown, if  
9 you look at the definition of an investment adviser under the  
10 Investment Advisers Act of 1940, the defendant has held  
11 himself out as an investment adviser.

12 If we look further down to determine whether under  
13 the Investment Advisers Act of 1940, which the guidelines  
14 certainly refer to, whether he is engaged in dealing with  
15 securities, the Investment Advisers Act clearly defines  
16 securities, and when you look through these definitions,  
17 there's no question in the Court's mind that the defendant  
18 was selling securities.

19 The only question the Court has is -- and the  
20 defendant has raised this -- the government had the burden to  
21 show the defendant's violations involved securities law to  
22 warrant an enhancement under 2B1.1(b) (20).

23 Now, there are any number of statutes -- there's  
24 several statutes certainly named that involve violations of  
25 securities law: 18 U.S.C. Section 1348, 1350, and 3(a) (47)

1 of the Securities Exchange Act of 1934. And certain rules  
2 and regulations under the SEC certainly could be relied upon  
3 as securities law that the defendant violated.

4 The Court does not clearly see that this has been  
5 laid out in the government's position paper, and certainly  
6 none of those statutes were argued this morning by the  
7 United States.

8 The bottom line is the Court will find the  
9 government has not met its burden to establish by a  
10 preponderance of the evidence that he was involved in  
11 violations of securities law, so the Court will strike the  
12 four-point enhancement on this particular point, on this  
13 particular objection.

14 Now let's move on to the fourth objection.

15 MR. GRINDROD: Your Honor, this has -- I'm sorry,  
16 did Your Honor want me to start, or did you have comments  
17 before I start?

18 THE COURT: No, not yet.

19 MR. GRINDROD: Your Honor, I'll really rely on our  
20 written submission on this, unless the Court has any  
21 particular questions. We tried to describe our objection to  
22 the -- our objection to the obstruction enhancement in our  
23 filing.

24 In very brief summary, with respect to the alleged  
25 comments by Mr. Sykes, accepting for the sake of argument



1 that his testimony would be credited, which we don't admit  
2 but we understand the Court might credit that testimony,  
3 there's still an absence of evidence as to why Mr. Smith may  
4 have said that, and the government has the burden of proving  
5 that Mr. Smith acted with a particular purpose, the purpose  
6 of obstructing an investigation. So we think that evidence  
7 is lacking here.

8 And with respect to the destruction or shredding of  
9 any evidence, the government has to show that the destroyed  
10 evidence was material. Here, I think the evidence is  
11 undisputed; the government never made any attempt to try to  
12 obtain records from Mr. Smith or determine what records were  
13 even destroyed, if any were, and so the showing as to the  
14 materiality of any records that were destroyed, I think is  
15 belied by the government's own conduct.

16 If they thought that Mr. Smith had material  
17 information, presumably it would have got a search warrant or  
18 asked for some way of obtaining that information, none of  
19 which the government did.

20 Other than -- I can answer the Court's questions or  
21 elaborate more, but we tried to set it out in our filing.

22 THE COURT: Thank you.

23 MS. YUSI: Your Honor, as we discussed in our  
24 position paper, there were two aspects that we were focused  
25 on as to why Mr. Smith deserves the two-level enhancement for

1 obstruction of justice; the first being Mr. Sykes asking  
2 where his money was, getting excuses from Mr. Smith, and  
3 Mr. Smith blaming government investigations and government  
4 interference, and then he said, "Do not talk to the FBI if  
5 they call you."

6 And we heard from Mr. Dunn during trial, Your Honor,  
7 when they met up at a conference, or somewhere like that, he  
8 had warned Mr. Smith that there were too many investigations  
9 and that where there's smoke, there's fire. Mr. Smith knew  
10 about these investigations for many years.

11 In terms of when he was deposed by the bankruptcy  
12 trustee, Your Honor, he stated that it was around the  
13 beginning of 2018 that he decided not to renew his license  
14 and that he joyfully got rid of -- as the creditors started  
15 coming after him, that he joyfully shredded all the documents  
16 and cleaned his computers.

17 And as this Court knows, Mr. Bank was indicted in  
18 2017, so in terms of his knowledge that there were active  
19 investigations going on and that he intended to obstruct  
20 justice, we believe that the evidence has shown that.

21 THE COURT: Okay. Thank you.

22 Before the Court is the defendant's objection to a  
23 two-level enhancement for obstruction of justice under 3C1.1.

24 Under 3C1.1, the defendant should receive this  
25 two-level enhancement if he "willfully obstructed or impeded,

1 or attempted to obstruct or impede, the administration of  
2 justice with respect to the investigation, prosecution, or  
3 sentencing" et cetera, "the obstructive conduct related to  
4 (A) the defendant's offense of conviction and any relevant  
5 conduct; or a closely related offense."

6 And the government is suggesting here that the  
7 defendant has willfully, or for the purpose of obstructing  
8 the investigation, that he has engaged in conduct that was  
9 material.

10 The allegation is -- and I don't think it's  
11 disputed -- that the defendant attempted to persuade an  
12 individual, K.S., not to basically cooperate with law  
13 enforcement by not talking to them;

14 Secondly, that he shredded certain files in evidence  
15 when he knew an investigation was ongoing certainly  
16 pertaining to some of his co-conspirators' conduct, and he  
17 was a co-conspirator, and he did this prior to the time --  
18 after one of the primary co-conspirators had already been  
19 investigated. And it's on this ground that the government  
20 seeks to have him receive a two-level enhancement.

21 Now, I have another question for the government, and  
22 that is, since he clearly had not been focused upon -- I  
23 don't know that Mr. Smith had been approached by the  
24 United States or anyone at that juncture about his conduct --  
25 do we know whether what he destroyed was, in fact, material

1 to what the United States really wanted from Mr. Smith?

2 That's what the Court is beginning to wonder about.

3 He shredded his files. What files? Were they files  
4 related directly to this case or his other conduct, since he  
5 was involved in other conduct? In other words, the Court has  
6 some concern about the materiality of what he was doing.

7 "Do not speak to law enforcement," and he joyfully  
8 shredded certain files that he had. He was dealing with the  
9 State of Arizona at that time.

10 This is a multipronged, multiyear conspiracy here,  
11 and at this juncture, it's not very clear to the Court that  
12 the government has met its burden, unless the government has  
13 something else they want to add on this two-level enhancement  
14 here. If not, the Court will strike the two-level  
15 enhancement.

16 I don't think it has been shown by a preponderance  
17 of the evidence that it should be applied, even though  
18 Mr. Smith's conduct was questionable here.

19 So what it boils down to, in effect, the Court has  
20 taken out a four-level enhancement and a two-level  
21 enhancement, so the Court believes that where we started off  
22 with an offense level of 39, we are down now to an offense  
23 level of 36. That's the Court's calculation.

24 MR. GRINDROD: I'm sorry, Your Honor, I think it  
25 might be 33. So 39 minus the 4 for the one and 2 for the

1 other. That's 6 off.

2 THE COURT: That's just plain bad math on the part  
3 of the Court.

4 MR. GRINDROD: That's all right. We did the hard  
5 math earlier with the millions of dollars.

6 THE COURT: I think I learned to do that in  
7 elementary school.

8 Okay. It's 33. Anything else?

9 MS. YUSI: Your Honor?

10 THE COURT: Yes, ma'am.

11 MS. YUSI: We had agreed based on that it would be  
12 double-counting if he had received -- Mr. Smith received both  
13 the four-level for the investment adviser as well as the  
14 abuse of trust, and we agreed that it would be inappropriate  
15 to get both of those; however, considering the Court's  
16 ruling, we do believe that he should get the two-level  
17 enhancement for abuse of trust.

18 MR. GRINDROD: Your Honor, we set out our  
19 substantive objection to that at Pages 10 and 11 of our  
20 filing. I don't think the government even addressed it in  
21 their filing. Perhaps they can point me to it if I'm just  
22 missing it.

23 But the government hasn't raised this at all in  
24 their written filings when they had the opportunity to. I  
25 think it's been either waived or forfeited. But I'm happy to

1 address the substance if you want.

2 THE COURT: Well, the United States -- first of all,  
3 there's no objection. There was nothing in the position  
4 papers, that the Court recalls, arguing for the two-level  
5 enhancement for abuse of trust in the event the Court did not  
6 find that the four-level enhancement was appropriate.

7 It was not there, and for the sake of -- I withdraw  
8 that statement. It was not there, and so the Court is not  
9 inclined to go back now and add that, so I think we're going  
10 to have to go on with what we have here.

11 MS. YUSI: That's fine, Your Honor.

12 THE COURT: All right. Anything else, Mr. Grindrod?

13 MR. GRINDROD: No, Your Honor.

14 THE COURT: All right, then. Stand up, Mr. Smith.

15 Mr. Smith, the Court finds that you have a Criminal  
16 History Category of I, an offense level of 33. The advisory  
17 guideline range is 135 to 168 months.

18 You may produce evidence this morning in the form of  
19 character witnesses, your own personal testimony, or exhibits  
20 to assist the Court in determining what sentence is  
21 sufficient but not greater than necessary.

22 If you testify under oath this morning, you're going  
23 to be subject to cross-examination by one of the Assistant  
24 United States Attorneys. You may make an unsworn statement  
25 just before being sentenced, and you will not be

1 cross-examined by the United States. Or you may remain  
2 silent and have one of your counsel to handle all matters for  
3 you. Do you understand this?

4 THE DEFENDANT: Yes, Your Honor, I understand.

5 THE COURT: I will note for the record the Court has  
6 received a number of written character statements from you.

7 The Court will note that we found, I think, a number  
8 of character statements from you, Mr. Smith, including your  
9 wife and a number of other family members, friends,  
10 neighbors, and et cetera. So the Court has read those. Are  
11 there other character letters you wish to submit?

12 MS. McCASLIN: No, Your Honor, we're relying on the  
13 ones that we've submitted.

14 THE COURT: Are there any live witnesses you have?

15 MS. McCASLIN: No, Your Honor.

16 THE COURT: Fine. You may have a seat.

17 Does the United States have any witnesses?

18 Oh, there's one other thing the Court would point  
19 out. From the United States' standpoint, the Court notes  
20 that the United States submitted by disk a substantial number  
21 of victims in this case, so the Court is aware of that.

22 Does the United States have any witnesses?

23 MS. YUSI: Your Honor, we have one victim that would  
24 like to read his statement -- Mr. Wilfried Berndt.

25 THE COURT: Okay. You may come forward.

1 MR. BERNDT: Can I take my mask off?

2 THE COURT: Are you vaccinated?

3 MR. BERNDT: Say again?

4 THE COURT: Have you been vaccinated?

5 MR. BERNDT: No.

6 THE COURT: Keep it on.

7 MR. BERNDT: Leave it on?

8 THE COURT: Keep it on.

9 MR. BERNDT: All right.

10 It's very awkward for me to be here. I wrote this  
11 down ahead of time, and I'm here to get closure on it for  
12 myself.

13 I've struggled with this situation and loss for the  
14 past several years. The impact to me and my wife is both  
15 financially and emotionally over the course of this ordeal.  
16 We are recovering slowly financially, but emotionally we are  
17 healed.

18 This impacted me on a personal level since you,  
19 Bill, and I established a financial relationship and a  
20 friendship over the course of several years that we grew, and  
21 I had grown to trust you through that time period.

22 I learned about you listening to your radio program  
23 on a station in Sacramento. I was interested in the  
24 investments you promoted on air. I called you on the phone  
25 to give you -- and you gave me your -- you gave on your



1 program. I met you in person numerous times as our  
2 relationship grew over the course of several years.

3 Before investing through you -- sorry about that --  
4 I checked with the Sacramento area Better Business Bureau,  
5 which they had a five-star AAA meeting at that time. Every  
6 time we met, you began by telling me your first devotion and  
7 loyalty is to your Savior, Jesus Christ. I share the same  
8 belief, and this gave me the comfort in trusting you.

9 I'm saddened that you fell to temptation in your  
10 dealings with Kent Maerki and David Alcorn and others who  
11 committed fraud and then promoted their products.

12 When I testified during the trial, your defense  
13 attorney asked me if I knew what I was getting into when I  
14 invested in these types of ventures. I said, yes, I know the  
15 risk that I could lose all my investment; however, I would  
16 not have invested if I had known that this was a fraudulent  
17 venture.

18 So, anyway, I will pray for you. I'm sad to see you  
19 here.

20 That's all.

21 THE COURT: Thank you very much.

22 Do you have any other witnesses?

23 MS. YUSI: No, Your Honor, just argument.

24 THE COURT: Okay. The Court will hear your  
25 argument.

1 MS. YUSI: Thank you, Your Honor.

2 Your Honor, based on the Court's rulings today in  
3 terms of the guidelines sentence, we are now asking for at  
4 least 14 years, which would be the top of the guideline  
5 sentence for incarceration of Mr. Smith, and we believe that  
6 the 3553 factors would support such a request.

7 Now, the Court at this point is extremely aware of  
8 the defendant's conduct, along with his co-conspirators, and  
9 this particular defendant used his religion and his supposed  
10 vast experience in the financial industry to manipulate  
11 countless victims into giving him, many times, their life  
12 savings.

13 We heard from many of them at trial. We've heard  
14 from Mr. Berndt today and others through their victim impact  
15 statements about the damage he caused them; to their  
16 families, their trust, and their life savings in which they  
17 were going to retire on.

18 The betrayal went well beyond the loss of money, and  
19 what's pretty shocking is that he's asking to be treated  
20 along the lines of his co-defendants who have accepted  
21 responsibility.

22 As the Court is aware, several of the defendant's  
23 co-defendants were given very beneficial plea agreements,  
24 partly due to COVID, with a max of 60 months, and the  
25 defendant is now asking that he should only be given a few

1 months above this.

2 And this is way off base, Your Honor. His  
3 co-defendants were given a benefit with those plea  
4 agreements. That doesn't mean the government is now treating  
5 the defendant more harshly or punishing him for not pleading.  
6 He's in the exact same position that anyone who did not plead  
7 guilty and accept responsibility would be in today.

8 The defendant is one of the most prolific master  
9 manipulators in this nationwide scheme. He had more direct  
10 sales to victims than almost any of the other defendants,  
11 except perhaps, maybe, Daryl Bank and Roger Hudspeth, to whom  
12 he was about equivalent in terms of the number of direct  
13 victims.

14 Roger Hudspeth, who Judge Doumar -- he was the first  
15 person to plead guilty to this scheme, and he accepted  
16 responsibility and was given well over ten years'  
17 imprisonment, fully accepting his role in the conspiracy and  
18 also cooperating with the government in the trial of Daryl  
19 Bank and Billy Seabolt.

20 To this day, the defendant has not expressed one  
21 iota of regret, not a single admission of responsibility.  
22 We're asking for a significant sentence, not because he went  
23 to trial, but because he has not taken any steps towards  
24 acceptance of responsibility and because he was heavily  
25 involved in stealing millions of dollars from victims who

1 were especially vulnerable, whether it be to their age; their  
2 education level; their learning difficulties, as we heard  
3 from Ms. Groff; or their vulnerability to their religious or  
4 spiritual beliefs which they thought they shared with the  
5 defendant.

6 And not just that the defendant has no remorse, Your  
7 Honor, nor apparently any consciousness or care for the pain  
8 and damage he has caused, he also went out of his way to  
9 further try to trick his victims and never giving them the  
10 straight story; that he knew that everyone else had lost  
11 their money or that no one had given their money -- to keep  
12 the victims from the truth.

13 Mr. Sykes and others, along with the deposition that  
14 he gave -- that Mr. Smith gave in the deposition with the  
15 bankruptcy trustee, the government believes that that  
16 recording showed great insight into the defendant's psyche;  
17 he blames everyone else for money losses and never himself,  
18 and that's because he still doesn't think he's done anything  
19 wrong. It's everyone else's fault, and everyone else did  
20 wrong or is wrong, just not him.

21 In his position paper, the defendant still touts  
22 himself as a religious, family-oriented man. A lot of his  
23 letters in support talk about this. And this is in direct  
24 contrast to the evidence shown in this case.

25 The evidence showed, and the government avers, that

1 he's a greedy, arrogant, and selfish man with no regard to  
2 anyone else. His true self, which the Court saw in trial and  
3 the victim impact statements, is the antithesis of someone  
4 who claims to be godly. He used his supposed faith as a  
5 sword and tool to trick victims. It's abhorrent and should  
6 be considered in fashioning an appropriate sentence.

7 Now, the notion, as one of the letters and the  
8 defendant talks about in his position paper, that Mr. Smith  
9 ended up in this situation because he is too trusting and  
10 naive is simply outrageous, Your Honor.

11 He knew before any of the defendants, based all the  
12 way back in Dazzle Dental, that Kent Maerki and Dental  
13 Support was a sham. He knew for years that everything Kent  
14 Maerki and Daryl Bank touched or did was a failure and a  
15 fraud, and he continued to sell because it gave him money.

16 Pure and simple greed, Your Honor.

17 As for any medical issues the defendant claims as a  
18 basis for downward departure, the Bureau of Prisons is well  
19 equipped to deal with all of these. They serve as no basis  
20 for any downward departure.

21 The majority of his victims were his age or even  
22 older than he sold to, Your Honor, and some in considerably  
23 worse health than he claims to be. The defendant does not  
24 deserve any benefit that he did not grant his own victims.

25 And, Your Honor, for all of these reasons, we

1 believe that the sentence of at least 14 years' imprisonment  
2 is well supported by the 3553 factors, and we ask the Court  
3 to impose such a sentence.

4 THE COURT: Thank you.

5 MS. McCASLIN: Your Honor, Mr. Smith is a salesman,  
6 just like Mr. Sellers and just like Mr. Barnett. The  
7 government, in their position paper, asked for 25 years, and  
8 today they're asking for at least 14. This is in stark  
9 contrast to what Mr. Sellers and Mr. Barnett received. They  
10 both pled; they both received a sentence of five years.

11 The same plea was available to Mr. Smith. The only  
12 difference now is that he chose to exercise his  
13 constitutional right to go to trial, his right to hold the  
14 government to their burden of proof, and his right to remain  
15 silent under the Fifth Amendment.

16 The government says that this is not a trial  
17 penalty, it's because he didn't admit anything. I object to  
18 that because they are essentially punishing him for invoking  
19 his right to remain silent. He has a right to plead not  
20 guilty and hold the government to their burden, and because  
21 he chose to do that, his sentence is now three times higher.

22 If you look at Mr. Sellers and Mr. Barnett, though,  
23 which the government argues that they've been helpful to the  
24 government in many ways, that they cooperated, that they  
25 are -- and according to their paperwork, they are most likely

1 eligible for a Rule 35 for their cooperation.

2 Mr. Sellers testified. He sat right there and  
3 testified, and he perjured himself on the stand. He denied  
4 using Daryl Bank to hide money in his divorce assets, which  
5 is fraudulent. Asked repeatedly, he said, "No, I did not do  
6 that," "No, I did not do that," until he was given his own  
7 Statement of Facts that he had already pled to where he  
8 admitted he had done that. And still, he's likely eligible  
9 for a Rule 35 despite his perjury.

10 Now, Mr. Barnett did not testify, though that begs  
11 the question of why. Mr. Barnett clearly sat down for a  
12 proffer, and so him not testifying either means that his  
13 testimony was not going to be helpful for the government and  
14 that he did not stick with that Statement of Facts that he  
15 had already pled to -- walked it back, minimized it -- that  
16 means he either lied to law enforcement in his proffer, or he  
17 committed perjury when he pled guilty to the Statement of  
18 Facts and had pled guilty because he was guilty, because, of  
19 course, *Alford* pleas don't exist in federal court.

20 In comparison to a couple of the other cases  
21 involved here, Mr. Maerki received 16 years. He is the top  
22 of the indictment in this case. He is the most culpable. He  
23 is the creator of these investments. He is a self-proclaimed  
24 expert on spectrum, and even his own employees described him  
25 as a mastermind.

1 Ms. Gibson was not a creator, but she coordinated  
2 everything for Daryl Bank. She was involved in day-to-day  
3 activities, with the spreadsheets, the bank accounts. She  
4 was moving money left and right. She received ten years.

5 Now, Mr. Smith facing three times what he would have  
6 been given for a plea doesn't just affect Mr. Smith; it's a  
7 message to all defendants that this is what happens if you  
8 don't plead.

9 The government has substantial resources, leverage,  
10 power. And 98 percent of the defendants plead guilty in the  
11 federal system. But if you dare to be in that 2 percent,  
12 your sentence is going to be triple or five times what they  
13 had offered you, so don't you dare go to trial.

14 This is a very coercive pressure that will have  
15 effect on other cases in the future.

16 We understand that acceptance of responsibility does  
17 give a benefit to defendants, as it should, but it's supposed  
18 to be a modest amount of two to three points, not three times  
19 higher for somebody who chooses to exercise his  
20 constitutional rights.

21 Now, in terms of history and characteristics,  
22 Mr. Smith is 70 years old with medical issues. He has no  
23 criminal history, no civil injunctions, or previous  
24 reprimands. He's been sober for 40 years. He attends AA  
25 nearly every day; or, at the very least, several times a



1 week.

2           And he's been at the same church for decades. We  
3 understand that there are victims at the church. But his  
4 whole life also revolves around that church, and you can see  
5 that he is highly involved. You can see it in the letters.

6           Some of his own friends lost money, people he is  
7 still very close with, people who he is still friends with,  
8 who he still loves. And of course, he's been married to his  
9 wife, Sue, for over 30 years. He stepped up as a father to  
10 her children, raised the youngest as his own.

11           And I do just want to let the Court know that when  
12 this was scheduled for sentencing in June, his wife, Sue, and  
13 one of his daughters did fly out here to be present for the  
14 sentencing. They weren't able to fly out again, but I did  
15 want to let the Court know that they would have liked to be  
16 present here today. So he does still have the support of his  
17 family.

18           You can also see in the letters that, especially  
19 from his daughter Rebecca, Mr. Smith brings home fairly  
20 random people who he thinks are struggling. He has done this  
21 for decades. If somebody needs a good meal, if somebody  
22 needs a shower, or if they need a little bit of money, he'll  
23 help try to find them some daywork. This isn't newsworthy.  
24 It's not somebody that anybody is going to write a newspaper  
25 article on. It's just the little day-to-day things.

1           These offenses do not represent his whole life. And  
2 all of these positive factors in his life all factor into the  
3 3553(a) factors.

4           Your Honor, he's not a risk of recidivating. Unlike  
5 Mr. Maerki who continued fraudulent activity while on bond  
6 and had his bond revoked, Mr. Smith went out and got his CDL  
7 license and was driving. He only stopped driving because of  
8 medical issues. He had to get hospitalized.

9           He gave up the financial world.

10          In terms of a sentence, Your Honor, we are arguing  
11 for a sentence between 70 and 87 months, which would take  
12 into consideration the sentence he could have received under  
13 a guilty plea but taking away any acceptance of  
14 responsibility of that benefit of the guilty plea. And  
15 according to the guidelines, that's where it lands.

16          Your Honor, a sentence of 15 years at his age could  
17 easily be a life sentence. A sentence of 70 to 87 months  
18 could easily be a life sentence, but age is something that  
19 the Court should consider, that Mr. Smith should not be  
20 looking at a de facto life sentence.

21          We understand that justice is multifaceted, Your  
22 Honor. The Court has to consider punishment based on  
23 compassion for the victims, rehabilitation, restitution that  
24 they are owed, and also compassion for Mr. Smith; that is  
25 part of justice, and avoiding a de facto life sentence is

1 part of that.

2 Three times the sentence he would have received, or  
3 five times, is not justice. It is punishment for exercising  
4 his trial rights. It's punishment for invoking his Fifth  
5 Amendment right, not testifying, his right to remain silent.  
6 It's punishment for holding the government to their burden of  
7 proof, and it's punishment for making them do their jobs.  
8 And that is not justice, Your Honor.

9 One final request, Your Honor, is that we do ask for  
10 a recommendation to a prison, FCI Dublin, which is in  
11 California near his family, so that he can maintain contact  
12 with his family easily.

13 THE COURT: Thank you.

14 MS. McCASLIN: Thank you.

15 THE COURT: All right. Mr. Smith, would you  
16 approach the podium.

17 Did Mr. Smith indicate whether he wished to make any  
18 comment or not?

19 MS. McCASLIN: No, Your Honor, he will not be making  
20 a comment.

21 THE COURT: All right. Mr. Smith, the Court has to  
22 give you a sentence that's sufficient but not greater than  
23 necessary, and you have heard argument of the counsel; the  
24 government asks for the equivalent of 14 years, and your  
25 counsel asks for something like 6 years and 10 months, or 70

1 to 87 months. There's a big difference there.

2 The Court has to decide what is sufficient but what  
3 is not greater than necessary, and there are what are called  
4 sentencing factors to help the Court to decide that, but  
5 there's one thing I want to address before the Court even  
6 starts with that, and that is the argument of your counsel  
7 that you have been penalized for going to trial and it  
8 undermines justice.

9 The Court couldn't disagree more with that argument.  
10 It sounds rational, but it's not the case here. Your  
11 sentence is greater because you were convicted of six counts.  
12 It is your decision if you want to plead guilty in a case to  
13 one count or not. That's your right. It's your right to go  
14 to a trial, and you're not penalized for that. You're  
15 penalized based on what you're convicted on. It's as simple  
16 as that.

17 You're not penalized for not testifying. That's  
18 your right. But the Court may consider the lack of remorse.  
19 It doesn't have to come forward based on what you say on the  
20 witness stand, but let's just be honest about this and  
21 straight about this.

22 You're not penalized because you went to trial. The  
23 penalty is based on the number of counts on which you stand  
24 convicted. If you had 30 counts, the penalty would be even  
25 more, but it's six counts versus one count for some of your

1 co-conspirators. It's as simple as that.

2           The first thing the Court has to consider is what  
3 did you do to bring you here, Mr. Smith. We've talked about  
4 this. You were engaged in a conspiracy that defrauded  
5 investors; a multifaceted, multipronged conspiracy that  
6 ripped off people of their hard-earned dollars, their  
7 retirement; a multifaceted conspiracy that was based on slick  
8 talk, manipulation, and all kinds of skills that a salesman  
9 can use to get people to depart with their money.

10           You were involved in this scheme with multiple  
11 people, many of whom have been convicted in this case, and  
12 some have been sentenced, all except two.

13           The record reflects that you used your religious  
14 background to manipulate your victims. To get them to trust  
15 you, you used religion to reel in your victims and to get  
16 them to depart with their money.

17           You lied continuously to victims about what they  
18 could reap from their investments. The Court had a victim  
19 impact statement for you for around 46 different people here  
20 on this list who lost significant money because of your  
21 conduct.

22           But the Court doesn't stop there. The Court has to  
23 consider who you are as an individual, which means that the  
24 Court has to consider what's referred to as the 3553 factors,  
25 which talks about your personal history and your

1 characteristics. And the Court has read the Presentence  
2 Report and read the letters.

3 I will tell you, your letters from various people do  
4 reflect, to a certain extent, a different man from the person  
5 standing here. You certainly persuaded a lot of people about  
6 the good things that you did as a religious leader and other  
7 things in the community, but you also had a dark side that  
8 was evidencing itself at the same time you were preaching  
9 redemption and repentance to your flock.

10 You're 70 years old. The record reflects that you  
11 have three siblings; one sister, two brothers. The record  
12 reflects a few other things. You indicated your parents were  
13 supportive, your father was a strong man, a principled  
14 individual. You grew up in a strong Christian, value-based  
15 family.

16 You talked about your parents here, and your parents  
17 are deceased, based on what the Court is reading in the  
18 record here.

19 You've been married four times during your life.  
20 The first marriage, you were 19. And your couple other  
21 marriages didn't last very long, based on what's in the  
22 Court's record here. You have two children as a result of  
23 your first marriage. You have four stepchildren. So you  
24 have family out here that are supportive of you.

25 You were first ordained back in 1970. You served as

1 a priest and various roles in your church, and that's where  
2 you met a number of your victims.

3 High school graduate; received a GED. I don't have  
4 any additional information on your education here. You  
5 dropped out of school, out of high school, but you managed to  
6 go back and get a GED.

7 Employment. You declined to provide any information  
8 regarding your past employment during the Presentence Report  
9 interview, so the Court doesn't know much about that.

10 From 2008 to when you were detained, apparently you  
11 were self-employed as a host of a "Money Talks" radio show.  
12 From 1999 forward, you were employed with American Estate  
13 Insurance Services. You were doing business through  
14 Executive Planning and Advisory Services as well as involved  
15 in selling investments in these fraudulent franchises that  
16 the Court has before it.

17 You apparently worked for Union Carbide from 1970 to  
18 1981. So that's just some of the things about your  
19 employment background.

20 The Court has some information on your physical  
21 condition, and the Court is aware that you've had some issues  
22 pertaining to your heart, systolic heart failure, and some  
23 other issues in the report. The Court is aware of that.

24 Now, the Court is not going to ignore the fact that  
25 your counsel has asked for a downward departure pursuant to

1 Section 5H1.1 and 5H1.4 of the sentencing guidelines. The  
2 Court is aware of that. But the downward departure that the  
3 Court could give must be based on some extraordinary  
4 circumstances, some extraordinary medical condition.

5 You are among many Americans that have some form of  
6 heart condition, and the Court does not see that the heart  
7 condition that you have is not one that the Bureau of Prisons  
8 is not capable of addressing. The Court deals with that all  
9 the time. So the Court doesn't find sufficient basis,  
10 factually, in the record to justify a downward departure for  
11 a physical or medical condition.

12 The Court notes that you were hospitalized in 2021  
13 for approximately 60 days and you were diagnosed with  
14 systolic heart failure, sepsis, syncope, left lower leg  
15 cellulitis, but these are conditions, once again I say, that  
16 can be treated in the Bureau of Prisons.

17 And you had a few issues in Western Tidewater  
18 Regional Jail, but they also addressed those. The record  
19 contains prescriptions you are taking at the current time.  
20 The Court is not going to list those in the record. The  
21 Court is aware of those.

22 You have no serious substance abuse problem. You've  
23 had some recovery from alcohol. You describe yourself as an  
24 alcoholic in recovery, but you've had the benefit of AA  
25 meetings over the last 40 years. But you've never received



1 any formal treatment or inpatient treatment for alcoholism,  
2 so that is not an issue, and you don't have any negative  
3 screens for any drugs or anything of that nature. So that's  
4 not an issue.

5 You don't reflect a lot of financial resources here.

6 You have no juvenile or adult convictions.

7 Those are some of the things personal about you.

8 But, now, the Court has to consider a few other  
9 things also, in addition to your personal history and  
10 characteristics and what you did to commit this offense. The  
11 Court has to be concerned about deterrence; deterring people  
12 who would do what you do, go out here and rip people off in  
13 some big investment scheme, so the Court has to be concerned  
14 about that.

15 The Court also has to be concerned about  
16 disparities. The Court does not want to create substantial  
17 disparities with respect to the penalties you receive.  
18 That's one reason the Court talked about the reason your  
19 penalties might be heavier than some others.

20 The Court has to, of course, protect the public from  
21 schemes. I just said that a few minutes ago. And the  
22 sentence has to reflect the seriousness of the offense you  
23 committed. It is a serious offense when you deprive people  
24 of their money through theft.

25 So we have to promote respect for the law. At the

1 same time, the law provides that I must provide, as a judge,  
2 for any medical care you need or any other correctional needs  
3 you may have, treatment you may need, any educational or  
4 vocational needs. I don't think that those loom large in  
5 what the Court has to consider here.

6 With respect to disparities, sentences in this big  
7 scheme range from 35 years back to 5 years. Some have  
8 received ten years; 16 years; and a vast range, depending  
9 upon the role they had in this offense and what was the  
10 nature of their conviction, how many convictions they had. I  
11 skipped 12.5 years, 10 years, 35 years, 16 years. So it's  
12 varied.

13 And it's always a challenge, Mr. Smith, to determine  
14 what is the best penalty and the most appropriate penalty and  
15 what is sufficient but not greater than necessary, is the  
16 standard, to impose in a case.

17 The Court understands the arguments made by your  
18 counsel, but the Court believes a 70-to-87-month sentence is  
19 just plain too low. The Court believes it's inappropriate,  
20 so the Court will not impose that. At the same time, the  
21 Court has not followed through on the government's original  
22 recommendation, the 25 years. The Court has not gone there.

23 So having balanced out any number of things in this  
24 case, the Court will sentence you as follows:

25 Pursuant to the Sentencing Reform Act of 1984, it's

1 the judgement of the Court that the defendant, Aghee William  
2 Smith, is hereby committed to the custody of the  
3 United States Bureau of Prisons to be in prison for a total  
4 of 156 months.

5 The term consists of 156 months on Count One, a term  
6 of 60 months on Count Two, to be run concurrently; 156 months  
7 on Counts Eight, Nine, Sixteen, and Seventeen, all to run  
8 concurrent with Count One.

9 Upon release from imprisonment, you shall be placed  
10 on supervised release for a term of three years. This term  
11 consists of three years on Counts One, Two, Eight, Nine,  
12 Sixteen, and Seventeen, all to run concurrently.

13 As reflected in the Presentence Report, you present  
14 a low risk of future substance abuse, and therefore, the  
15 Court hereby suspends the mandatory condition of substance  
16 abuse testing as defined in 18 U.S.C. Section 3563(a)(5);  
17 however, this does not preclude the probation officer from  
18 administering drug tests as they deem appropriate.

19 You shall comply with the standard conditions of  
20 supervision that have been adopted by this Court and have  
21 been incorporated into this judgment by reference; that is,  
22 the standard conditions of supervised release as adopted by  
23 the Eastern District of Virginia. They are incorporated by  
24 reference into this judgment.

25 You shall also comply with the following additional

1 conditions:

2           You shall apply all moneys received from income tax  
3 refunds, lottery winnings, inheritances, judgments, and any  
4 anticipated or unexpected financial gains to the outstanding  
5 court-ordered financial obligation or in a lesser amount to  
6 be determined by the Court upon the recommendation of the  
7 probation officer.

8           You shall not incur new credit charges or open  
9 additional lines of credit without the approval of the  
10 probation officer. You shall provide the probation officer  
11 access to any requested financial information.

12           You are prohibited from being employed in any  
13 capacity involving investments.

14           You shall participate in the Treasury Offset Program  
15 as directed by the probation officer.

16           You shall participate in a program approved by the  
17 United States Probation Office -- hold one second, please.

18           (Pause)

19           THE COURT: Okay. We will strike the last statement  
20 the Court started to make.

21           I will state for the record that there's some record  
22 that you believe at some point in the past you suffered from  
23 depression, but there's insufficient evidence in this record  
24 to indicate that you are in need of mental health treatment.

25           So we turn to the financial penalties. The Court

1 has considered the amount of losses sustained by the victims  
2 as a result of these offenses, your net worth and liquid  
3 assets, your lifestyle and financial needs as reflected in  
4 the Presentence Report, your earning potential, and your lack  
5 of dependents relying on you for support.

6 The Court finds that you're not capable of paying a  
7 fine, but you are capable of making full restitution as  
8 required by statute. Accordingly, you shall pay the  
9 following total penalties:

10 As to Counts One and Two, you shall pay a special  
11 assessment in the amount of \$100 on each count. As to  
12 Counts Eight, Nine, Sixteen, and Seventeen, you shall pay a  
13 special assessment in the amount of \$100 on each count, for a  
14 total special assessment of \$600.

15 You are required to pay restitution, which shall be  
16 paid proportionately among the payees named. You are jointly  
17 and severally liable for restitution with the following  
18 co-defendants: Kent Maerki, David Alcorn, Tony Sellers,  
19 Norma Jean Coffin, all of case 2:19cr47; Daryl G. Bank,  
20 Raeann Gibson, Billy Seabolt, all of case 2:17cr126; and  
21 Roger Odell Hudspeth in Case 2:17cr122.

22 The Court has a restitution order here on the bench.  
23 Pursuant to the restitution that has been determined by this  
24 Court that's in the order, you shall pay \$21,128,490.48.  
25 Interest on this restitution is waived.

1           The restitution is due today. If it's not fully  
2 paid, you shall pay to the Clerk at least \$400 per month or  
3 25 percent of your net income, whichever is greater,  
4 beginning 60 days after your release from confinement.

5           Now, the Court notes that you have not signed this  
6 particular restitution order. Is that correct?

7           MS. McCASLIN: That's correct, Your Honor.

8           THE COURT: And neither counsel signed it.

9           MS. McCASLIN: Correct.

10          THE COURT: But you are aware of the restitution  
11 order; is that correct, Mr. Smith?

12          THE DEFENDANT: Yes.

13          THE COURT: Okay. The Court will enter the  
14 restitution order apparently over the defendant's objection.  
15 Am I correct, Ms. McCaslin?

16          MS. McCASLIN: Yes, Your Honor.

17          THE COURT: I think what the Court is going to do is  
18 have it "seen and objected to." I'll just pass it back and  
19 have you write "seen and objected to."

20          (Pause)

21          THE COURT: As I indicated, your first payment will  
22 be due 60 days after your supervision begins.

23          With respect to the \$600 special assessment, any  
24 balance not paid on those today shall be paid by you in  
25 installments of not less than \$50 per month until paid in

1 full, and the first such payment shall commence 60 days after  
2 your supervision begins.

3 The Court recommends to the Bureau of Prisons that  
4 you be incarcerated in California, in the Dublin correctional  
5 facility if possible.

6 You have a right to appeal the judgment entered in  
7 this case, Mr. Smith. If you wish to appeal, you simply note  
8 it for your counsel, and they will effect an appeal for you.  
9 Do you understand this?

10 THE DEFENDANT: I do.

11 THE COURT: Is there anything else from the  
12 United States?

13 MS. YUSI: No, Your Honor, thank you.

14 THE COURT: Anything else?

15 MS. McCASLIN: No, Your Honor, thank you.

16 THE COURT: If there's nothing else, the Court will  
17 be in recess.

18 (Proceedings adjourned at 1:01 p.m.)  
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22  
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25

CERTIFICATION

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

Carol L. Naughton

October 27, 2022